

Nguyen (Migration) [2020] AATA 206 (29 January 2020)

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DECISION RECORD

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Mrs Lan Thi Tuyet Nguyen
VISA APPLICANTS:	Mr Minh Tai Nguyen Mrs Thi Thu Ha Duong
CASE NUMBER:	1824478
DIBP REFERENCE(S):	BCC2018/1370825
MEMBER:	Ian Garnham
DATE:	29 January 2020
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal remits the applications for Visitor (Class FA) visas for reconsideration, with the direction that the first and second named applicants meets the following criteria for subclass 600 (Visitor) visas: • Public Interest Criterion 4020 for the purposes of cl.cl.600.213 of Schedule 2 to the Regulations.

Statement made on 29 January 2020 at 4:04pm

4. **CATCHWORDS**

MIGRATION – Visitor (Class FA) visa – Subclass 600 (Visitor) – Sponsored Family stream – false or misleading information – first visa applicant provided details of children and grandchildren in Australia – second visa applicant also provided details of sisters, nieces and nephews (in-laws of first visa applicant) in Australia without valid visas – ‘family member’, ‘member of a family unit’ and ‘relative’ – previous compliant travel and migration – decision under review remitted

5.

6. **LEGISLATION**

7.

Migration Act 1958 (Cth), ss 65, 360(2)

Migration Regulations 1994 (Cth), r 1.03, 1.12, Schedule 2, cl 600.213, Schedule 4, criterion 4020

CASES

Arora v MIBP [2016] FCAFC 35

Batra v MIAC [2013] FCA 274

Trivedi v MIBP [2014] FCAFC 42

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

8. This is an application for review of a decision made by a delegate of the Minister for Immigration on 6 August 2018 to refuse to grant the applicants Visitor (Class FA) visas under s.65 of the *Migration Act 1958* (the Act).
9. The applicants applied for the visas on 23 March 2018.
10. The Departmental (Department of Home Affairs (DOHA)) delegate refused to grant the visas on the basis that the first named applicant (the applicant) did not satisfy the requirements of cl.600.213 of Schedule 2 to the Migration Regulations 1994 (the Regulations) because they were satisfied that the 1st named visa applicant had provided, in association with the application, a bogus document or information that was of a non-genuine nature. Because the 2nd named visa applicant is a member of the 1st named visa applicant's family unit their visa application was also refused.
11. On 11 December 2019 the tribunal wrote to the review applicant and, among other things, invited them to attend a hearing on 13 January 2020.
12. The review applicant, who is a daughter of the visa applicants, is represented in relation to the review by her registered migration agent.
13. A submission¹ dated 24 December 2019 and associated documents² were provided to the tribunal. Based on the contents of the submission and the documentary evidence before it, the tribunal conducted the review without a hearing pursuant to section 360(2)(a) of the Act.
14. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

15. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl.cl.600.213 for the grant of the visa. Broadly speaking, this requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and

¹ At FF: 36-38 (AAT)

² At FF: 30-35 (AAT)

- neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).

16. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?

17. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s.5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
18. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
19. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
20. The visa applications were made in the Sponsored Family stream and the reason given for visiting Australia was *family visit*. Furthermore the applicants stated they; *...would like to visit Australia to provide care for [their] daughter and grandchildren*. The response also referred to an 'explanatory letter' attached to the application. This 'explanatory letter' was in the form of a statutory declaration dated 22 March 2018 made by the visa applicants.³
21. The statutory declaration sets out that the review applicant and her husband work long hours establishing a restaurant business and the visa applicants had previously visited Australia and cared for the review applicant's young children.
22. On 21 May 2018 DOHA wrote to the first named visa applicant and requested; *All family members that are in Australia with full name and date of birth and current address details please*. In response the 1st named visa applicant provided these details for the review applicant, her husband and the 2 grandchildren. In addition, he cited a further daughter, her husband, and granddaughter who also live in Australia.
23. On 19 April 2018 DOHA wrote to the 2nd named visa applicant and requested; *Original CV*. On 26 July 2018 DOHA wrote to the 2nd named visa applicant and requested; *All family members in Aust Full name and DOB and current address*. In response the 2nd named visa applicant provided the original CV. This document included identical information provided by

³ At FF: 67-69 (DOHA)

the 1st named visa applicant and details of a further 8 relatives of the 2nd named visa applicant. These persons comprised 2 of her sisters and 6 nieces and nephews.

24. In all instances the visa applicants' applications and responses were prepared by the registered migration agent following instructions from the visa applicants.
25. Because the first named visa applicant failed to disclose the presence of 2 other relatives who are in Australia without valid visas the delegate found that the 1st named visa applicant; *attempted to mislead the department by not including two other relatives on his application form, in order to achieve a favourable outcome for his own Sponsored Family Visitor Visa.* Consequently, they found that the 1st named visa applicant had breached PIC 4020(1).
26. In the submission the following relevant points are made.
 - The visa application forms do not ask the visa applicants to cite all family members and/or relatives that are in Australia.
 - The request for further information made by the delegate was for 'family members' in Australia. The response provided included information that accurately identified family members as set out for the 'member of a family unit' definition provided at Reg.1.12.
 - Therefore it could be argued that both visa applicants provided accurate information with respect to their respective family members in Australia when requested to do so.
 - The requested information did not include relatives, which as defined by reg.1.03 would have included the further relatives of the 1st named visa applicant as identified in the 2nd named visa applicants CV.
27. Prima facie the 1st visa applicant's responses do not represent deficient or misleading information.
28. Moreover there appears to be no reason why either of the visa applicants would knowingly provide misleading information. All of the parties in this case have extensive compliant migration and travel history to Australia as identified in their movement details.
29. The review applicant first came to Australia on 09/06/2007 on a subclass 309 Partner visa, she has been an Australian citizen since 12/03/2015.
30. When the application was made the 2nd named visa applicant had made 7 previous compliant trips to Australia as a tourist. Similarly the 1st named visa applicant had made 2 previous compliant trips to Australia as a tourist.
31. For these reasons the tribunal is not satisfied that the 1st named visa applicant provided misleading information to DOHA.
32. Therefore, the 1st named visa applicant meets PIC 4020(1).

Has a visa previously been refused on the basis of a failure to satisfy PIC 4020(1)?

33. PIC 4020(2) requires the Tribunal to be satisfied that the applicant and each member of the family unit have not been refused a visa because of a failure to satisfy PIC 4020(1) in the period commencing 3 years before the application was made and ending when the visa is granted or refused. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: PIC 4020(2AA).

34. The delegate also found that the 2nd named visa applicant is a member of the 1st named visa applicant's family unit as defined in r.1.12. Therefore they found the 2nd named visa applicant failed to meet PIC 4020(2).
35. I have found that the 1st named visa applicant meets PIC 4020(1), therefore, PIC 4020(2) does not apply to the 2nd named visa applicant.

Has the applicant satisfied the identity requirements?

36. PIC 4020(2A) requires an applicant satisfy the Tribunal as to his or her identity.
37. With the application the first named visa applicant provided identity documents.⁴ The second named visa applicant also provided identity documents.⁵
38. Therefore, the visa applicants meet PIC 4020(2A).

Has a visa previously been refused on the basis of a failure to satisfy PIC 4020(2A)?

39. PIC 4020(2B) requires that neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy the identity requirements in PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: PIC 4020(2BA).
40. There is no information before the tribunal that either of the visa applicants or any members of their family units have failed to satisfy the identity requirements during the period starting 10 years before the application was made and ending when the visa is granted or refused.
41. Therefore PIC 4020(2B) is met by both visa applicants.
42. On the basis of the above, the visa applicants satisfy PIC 4020 for the purposes of cl.600.213.

DECISION

43. The Tribunal remits the applications for Visitor (Class FA) visas for reconsideration, with the direction that the visa applicants meet the following criteria for subclass 600 (Visitor) visas:
- Public Interest Criterion 4020 for the purposes of cl.cl.600.213 of Schedule 2 to the Regulations.

Ian Garnham
Member

⁴ At FF: 1&2 (DOHA)

⁵ At FF: 1-5 (DOHA)

ATTACHMENT

Migration Regulations 1994

Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is ***false or misleading in a material particular*** means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

Migration Act 1958

s.5 Interpretation

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

...